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THE OXFORD HANDBOOK OF

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CRIMINAL LAW

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*Edited by*  
MARKUS D. DUBBER  
*and*  
TATJANA HÖRNLE

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## CHAPTER 4

# FEMINIST APPROACHES TO CRIMINAL LAW

PRABHA KOTISWARAN

## I. THE FEMINIST PROJECT IN CRIMINAL LAW

THE criminal law has a special place in the history of feminist struggles for law reform. Indeed, in many countries the women's movement was inaugurated with the struggle for criminal law reform, typically on rape. Conversely, feminist legal critique has had a tremendous influence on criminal law, doctrinally, procedurally, and institutionally. Some have even claimed it "as the only academic movement of the 1980s that made an impact on criminal law."<sup>1</sup> Bold doctrinal law reform even in an area like rape, one of the earliest sites of feminist intervention, has however become enmeshed in the intractable stickiness of patriarchal social norms, which are hard to displace. Even so, over the few past decades the feminist project in domestic criminal law has morphed into a hugely successful intervention in the realms of international and transnational criminal law producing a set of unintended consequences that feminists themselves are increasingly perturbed by. In this chapter, I offer an overview of the feminist project in criminal law, mapping in particular its rising influence while also elaborating on the stakes involved and the

<sup>1</sup> George Fletcher, "The Fall and Rise of Criminal Theory," (1998) 1 *Buffalo Crim. LR* 279 ff.

costs and benefits of these successes. I seek to reveal various strands of the internal feminist critique of such successes, which suggest that feminists need to pause and reassess their non-reflexive resort to the state and the criminal law as a means of furthering feminist goals.

Feminist legal scholarship is today an established field intervening in areas as diverse as tort, contract, constitutional, labor, international, criminal and even tax laws. Yet, the very success of feminist legal theory and activism has gone some distance toward creating a sexual division of labor of sorts in legal academia. Feminists might still seem to congregate in family law. Within criminal law, feminists might specialize in sexual offenses, occupying a feminist intellectual ghetto, as Lacey characterizes it.<sup>2</sup> Other feminists may go a bit further to study the criminal law's reach over women as legal subjects involved in intimate relation<sup>3</sup> as with battered wives or where they disproportionately appear as victims. Although a feminist critique of the law of theft is as likely as the law of sexual assault to produce significant redistributive effects for women, the feminist project in criminal law bears strong path dependence in being intertwined around an axis of sex/gender/sexuality.

Even being tethered to the sex/gender axis of analysis, the reach of the feminist project in criminal law is extensive. One only has to consider the compulsory first-year criminal law curriculum to get a sense of likely arenas for feminist intervention. Teaching English criminal law, one can hardly fail to note early on in the law of causation, that the cases of *Steel and Malcherek*<sup>4</sup> are about women who were murdered because they refused the sexual advances of male defendants. Feminists have contributed to theorizing the duty of care in the context of omissions liability. Du-boid Pedain has drawn on care feminism to criticize decisions like *R. v. Bland*<sup>5</sup> and argue that viewed through the lens of "care morality," the doctor-patient duty of care might well exceed the demands of the criminal law and its "stranger morality."<sup>6</sup> Other feminists have interrogated the extent to which specific offenses, like homicide, rape, and grievous bodily harm reflect women's experiences. Seizing upon the contingency of the common law and the inability of outdated statutes to deal with domestic violence, for instance, English feminists have argued that a husband be held guilty of constructive manslaughter when his severely mentally abused wife commits suicide after being physically assaulted by him. They have energetically sought to reconfigure defenses such as provocation, diminished responsibility, and self-defense in the interests of female offenders. In the few instances where they

<sup>2</sup> Nicola Lacey, *Unspeakable Subjects, Feminist Essays in Legal and Social Theory* (1998), 99 ff.

<sup>3</sup> Victoria Nourse, "The 'Normal' Success and Failures of Feminism and the Criminal Law" (2000), Georgetown Public Law and Legal Theory Research Paper No. 13-037, 953 ff.

<sup>4</sup> *R. v. Steel and Malcherek* [1981] 1 WLR 690.

<sup>5</sup> *Airedale NHS Trust v. Bland* [1993] A.C. 789.

<sup>6</sup> Antje du Boid-Pedain, "The Duty to Preserve Life and its Limits in English Criminal Law," in Dennis Baker and Jeremy Horder (eds.), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (2013), 296–327 ff.

have not been solely preoccupied with defending women's interests, feminists have joined forces with critical legal scholars. Thus, when critiquing the non-availability of the defense of consent for sadomasochistic gay men, feminists may appear to have endorsed liberal values, only also then to bear witness to the very limits of liberalism in that sadomasochistic sex embodies "an erotics of anarchy, of treason, and an inversion of all that the law and a liberal legal system stand for."<sup>7</sup>

Feminist energy so far has not, however, been expended only on these turgid matters of first-year criminal law doctrine but has significantly contributed to a steady expansion of the remit of the criminal law, as it relates to the spheres of the family and the market. The feminist critique of the public-private divide within criminal law has led to the conceptualization of private harms such as child abuse, marital rape, date rape, homosexual rape, and domestic violence<sup>8</sup> in terms of crime,<sup>9</sup> leading to the creation of new offenses. As Jeannie Suk observes:

Over the past forty years feminists have advocated transforming the way that the home as a legal institution is perceived and treated, particularly by the criminal justice system. With the great success of this movement, the ideas that drive the reform are no longer new or radical to legal actors, they have laid down roots in legal doctrine, theory, and practice, as intellectual and ideological forces in lawmaking, adjudication, administration, and legal culture. They are now at home in the law.<sup>10</sup>

The popularity of the harm principle in offering the major justification for criminalization has assisted feminists whose list of gendered harms warranting criminalization has steadily grown. Indeed, in the Anglo-American world, feminist legal successes are synonymous with some form of criminal law reform. Feminists have been busy in many countries although their prospects for success vary across domestic jurisdictions. In the 1990s, Canadian feminists "witnessed, often with some astonishment, the development of a new and radical feminist inspired state discourse on 'violence against women,'"<sup>11</sup> including the official embrace of feminist anti-pornography discourse. In the United States and the United Kingdom, feminists have been successful in pushing forth legislation on a range of public harms against women such as sexual harassment, pornography, prostitution, voyeurism, rape, and stalking. Feminists have also been instrumental in re-envisioning how the criminal law relates to the market by delineating

<sup>7</sup> Matthew Weait and Rosemary Hunter, "Commentary on *R v Brown*," in Rosemary Hunter, Clare McGlynn, and Erika Rackley (eds.), *Feminist Judgments From Theory to Practice* (2010), 245 ff.

<sup>8</sup> Aya Gruber, "The Feminist War on Crime," (2006-07) 92 *Iowa LR* 741 ff.; see fn. 57, domestic violence did not exist as a crime, Schneider terms violence by intimates as "woman abuse."

<sup>9</sup> Lacey (n. 2) 101 ff.

<sup>10</sup> Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (2009), 4 ff.

<sup>11</sup> Lise Gotell, "A Critical Look at State Discourse on 'Violence Against Women': Some Implications for Feminist Politics and Women's Citizenship," in Manon Tremblay and Caroline Andrew (eds.), *Women and Political Representation in Canada* (1998), 39-84, 39 ff.

the conditions under which exploitative labor conditions can be prosecuted as trafficking. Implicit in this are judgments about the types of labor that may qualify as legitimate work.

More generally, feminist issues for criminal law reform can be characterized by feminist convergence (as with rape) or considerable feminist divergence as with pornography in the 1980s and with sex work and trafficking in recent years. The feminist project in criminal law also has multi-scalar reach. The province of criminal law itself has greatly expanded over the past few decades. International criminal law did not exist as a field in the 1950s<sup>12</sup> and this dynamic area of the law is arguably still relatively new and untested. Transnational criminal law, meanwhile, has received even less attention: indeed, it is only in the past decade that it has been theorized as a distinct body of law, which ought to be subject to the rigorous scrutiny that any domestic criminal law regime undergoes.<sup>13</sup> Interestingly, however, and perhaps as testimony to the transnational career of feminism, feminists have already left an indelible imprint on both international criminal law and transnational criminal law through their interventions on sexual violence in armed conflict and trafficking, respectively. Yet debates on criminal law in these contexts take place within the field of international law. This chapter is an effort to consolidate the common themes of feminist engagement in these arenas and to fold them back into the scholarship on criminal law, an endeavor that now appears urgent given the incredible reach of these reform efforts.

This chapter will reflect on the extensive points of contact between feminists and the criminal law at the domestic, international, and transnational levels. I start with the domestic level for feminists' most extensive and long-standing critique of the criminal law. Several of the unresolved feminist debates at the domestic level have then been transported to the international domain. There, in specialized bureaucratic spaces in foreign locales and without the pressures of democratic challenges to the lawmaking process, feminists have achieved successes that are not always easy to justify. Given the transnational nature of contemporary feminism, conceptual innovations at the international level are then borrowed back home to influence domestic law. Hence, the feminist project in criminal law can only be understood by tracing these flows of feminist legal expertise. Further, although I focus on the substantive law, feminists have been hugely invested in procedural and evidentiary reform as well as in restructuring the criminal justice system. Indeed, where the thrust of feminist lawyering has been to uncover gendered harms and rename them as crimes, reinforcements in the form of procedural law are vital for effecting a change in social norms.

<sup>12</sup> Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (2010).

<sup>13</sup> Neil Boister, "Transnational Criminal Law?," (2003) 14 *European Journal of International Law* 953–976 ff.

## II. REFORMING CRIMINAL LAW AT HOME— SOME EXAMPLES OF FEMINIST SUCCESS

### 1. Rape

The offenses of rape and domestic violence exemplify feminists' most hard-won successes in criminal law reform, with feminists having intensively engaged with rape law for very many years. Across the Anglo-American world, rape law reform has generally followed a certain trajectory of liberalization: although rape in many jurisdictions can only be committed by a male against a female, non-penile penetration has now been recognized thus displacing the patriarchal investment in the sanctity of the womb. Again, rape may or may not be gender-neutral as to the perpetrator, but is likely to be gender-neutral as to the victim. In addition, many jurisdictions have abolished the marital rape immunity. Where earlier a successful rape conviction required some *de facto* proof of the exertion of force by the defendant and active resistance by the survivor, rape laws now require the lack of affirmative consent. Consent is defined quite explicitly as in section 74 of the U.K. Sexual Offences Act 2003, where a consenting person agrees by choice, having both the freedom and capacity to make that choice. Rape shield laws are the corollary in evidentiary law to these shifts in substantive law, disallowing evidence of the survivor's past sexual history to be admitted at any stage of the trial except under certain restricted gateways.

In the United States, Gruber argues that American feminists' advocacy has strengthened state power to punish gender-based crimes in apparent lock step with the U.S. penal system. Laws that adopt prevailing views of criminality and victimhood, such as predator laws, enjoy great popularity. Rape continues to be understood in paradigmatic terms where strangers physically attack the rape victim rather than "nonparadigmatic" rapes where victims do not suffer physical injuries, or are acquainted with defendants, or are in sexual professions.<sup>14</sup> Moreover, reforms that seek to counter gender norms, such as rape shield and affirmative consent laws, are controversial, sporadically-implemented, and empirically unsuccessful.<sup>15</sup>

Even in jurisdictions with nuanced and liberalized rape laws, rape is under-reported, rape attrition rates are high, and victims continue to be doubly traumatized by trial, prompting considerable feminist inquiry into the gap between the law and its implementation. Consequently, there is a burgeoning literature on "rape myth acceptance," "victim precipitation beliefs," and their contribution to the "justice gap." "Rape myths" are descriptive or prescriptive beliefs about rape, its causes,

<sup>14</sup> Aya Gruber, "Rape, Feminism, and the War on Crime," (2009) 84 *Washington LR* 581–660, 594–595 ff.

<sup>15</sup> Gruber, (2009) 84 *Washington LR* 584 ff.



context, consequences, perpetrators, and victims that serve to deny, downplay, or justify male sexual violence against women. These views held by the general public and agents of the criminal justice system influence how individual rape allegations are disposed of.<sup>16</sup> One powerful myth is the myth of stranger rape involving “a sudden, surprise attack by an unknown, often armed, sexual deviant. It occurs in an isolated, but public, location, and the victim sustains serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack.” Few rapes share this profile, thus rendering the majority of rapes invisible within the criminal justice system. In their study of mock jurors’ deliberations, Ellison and Munro found that while jurors are not beholden to the stranger rape myth, they replicate strong gender stereotypes and belief in conventional scripts of sex, male and female sexuality, and a seduction script based around male-dominated, adversarial, sexual interaction—the location where it took place, the consumption of alcohol, and the sexual signals exchanged. Complainants were treated harshly if they were intoxicated, as they ought to have been responsible unless the defendant spiked their drink or indulged in morally inappropriate behavior. Further, Ellison and Munro found that jurors harbored numerous assumptions regarding the instinct to fight back, the compulsion to report the incident immediately, and the inability to control one’s attendant emotions; assumptions which influenced jury deliberations, and ultimately their verdict outcomes. Expectations of force, injury, and resistance were so deeply engrained in the popular imagination that educating jurors seemed futile. In a similar vein, Gotell shows how affirmative consent standards in Canadian rape law exhibit a specific expression of neoliberal governmentality with an attendant discourse of risk and responsibility for defendants and survivors alike.<sup>17</sup>

Strangely enough, feminists respond to the justice gap by asking for more criminal law that penalizes enforcement officials for refusing to file the victim’s complaint or the further education of judges, jurors, and enforcement officials to eliminate these biases. Yet some feminists have resisted this move by asking if feminists themselves might not be making erroneous assumptions about rape myths. In a controversial article in 2013,<sup>18</sup> Reece argues that feminists in assuming to know what “normal sex” looks like might in fact be hindering honest conversations on rape myths by setting up a divide between (their) elite opinion and the uneducated rape myths of the public. Feminists might inhabit these moments of immense uncertainty so as to assess the future direction of rape law reform.

<sup>16</sup> Louise Ellison and Vanessa E. Munro, “A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study,” (2010) 13 *New Crim. LR* 781–801, 782 ff.

<sup>17</sup> Lise Gotell, “Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women,” (2009) *Akron LR* 865–898 ff.

<sup>18</sup> See Helen Reece, “Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?,” (2013) *OJLS* 1–29 ff.

## 2. Domestic violence

While rape law has become consistently refined over time, feminists have had to rename domestic violence as a special offense rather than pursue liability for grievous bodily harm. Domestic violence reforms have gone farthest in the United States both due to the influence of radical feminism in U.S. legal theory and unique factors such as a strong victims' rights movement. Its success has meant that its "punitive, retribution-driven agenda" now constitutes "the most publicly accessible face of the women's movement."<sup>19</sup> Gruber symbolizes the main protagonist of the American feminist movement thus—

The zealous, well-groomed female prosecutor who throws the book at "sicko" sex offenders has replaced the 1970s bra-burner as the icon of women's empowerment. Indeed, many regard criminal law reform as one of feminism's greatest successes.

According to Suk, where the state was earlier loathe to interfere with the private domain of the home, it is today thought to be inadequate in preventing women's abuse from their own family members—domestic violence law has transformed the home into a site of coercion and abuse; home is where the crime is!<sup>20</sup> Increasingly, popular reforms in criminal court systems include "sweeping protection orders," "specialized courts," "special evidentiary rules," mandatory arrests, and no-drop policies.<sup>21</sup> Gruber has illuminated the confluence of the feminist movement and the conservative tough-on-crime victims' rights movement focused on retribution, pointing to the conservative origins of the framing of the crime of domestic violence, and feminists' strategies, which adopted a problematic victimization and agency rhetoric. Although the relation between domestic violence advocates and law enforcement was initially tenuous, Gruber argues that the dilemma between the aggressive prosecution of domestic violence as a form of gender subordination and the attendant costs to women's autonomy was eventually resolved in favor of the former. Mandatory arrest and no-drop policies took root all over the country. Suk claims that the criminal protection order, the "grandmother of domestic violence law" was crucial to the criminalization of domestic violence. The criminal protection order is often a condition of pretrial arrest so that presence at home becomes a proxy for domestic violence. Similarly, Suk shows how violating a protection order could result in prosecution for the serious felony crime of burglary. By obtaining a criminal protection order and making its violation a crime, the state she argues produces a criminal law practice of "state-imposed de facto divorce." Rather than punish violence between spouses and intimate partners, their decisions to live like spouses and intimate partners are increasingly being criminalized. Gruber

<sup>19</sup> Gruber, (2009) 84 *Washington LR* 582 ff. quoting Dianne Martin.

<sup>20</sup> Suk (n. 10) 6 ff.

<sup>21</sup> Gruber, (2006–07) 92 *Iowa LR* 747 ff.

bemoans how a grassroots progressive movement transformed into an ally of conservative criminology where, in order to support domestic violence criminalization in the face of victim reluctance, reformers maintained the innocent victim/pathological offender paradigm using the very methodology that was instrumental in women's oppression.<sup>22</sup>

Gruber lists numerous unintended consequences of domestic violence law reform, such as where domestic violence protection orders are routinely issued, often in *ex parte* situations, without the woman's request and where women are arrested more frequently, including for wasting state resources by not pursuing prosecution, thus undermining their autonomy. Suk goes further to argue that state-imposed *de facto* divorce shifts decisional power from individual women to state actors like prosecutors. Current domestic violence policies can, as Gruber and Suk point out, also have disparate effects on racial minorities. According to Suk, arraignments for domestic violence in New York county criminal courts by and large involve minorities living in the poorest parts of Manhattan, who are disproportionately prosecuted under these laws. Mandatory arrest and pro-prosecution policies thus reinforce systemic biases of the criminal justice system. Defendants' right to a fair trial is compromised. But minority women are not spared either, as women at the intersection of multiple axes of subordination (race, immigrant status, income level) appear to suffer the most under mandatory policies. Whether criminalization works is inconclusive:<sup>23</sup> of course, it sends out the symbolic message that domestic violence is serious but it entrenches the view that it is an insular rather than endemic wrong. As Suk points out, domestic violence reform has insidiously ensured criminal law control of the home alongside control-oriented approaches to crime in the public space—the home becomes an instrument for law enforcement within it but also an instrument for criminal law control. Individuals' private arrangements in property and intimate relationships are displaced, according to Suk, and they cannot contract around the state's mandates without risking punitive consequences. Domestic violence reform in the United States also went on to produce offshoots in tackling non-intimate violence against women through the introduction of the offense of stalking in the early to mid-1990s.

### 3. Battered Woman Syndrome

While feminists have vigorously lobbied for an expanded criminal law to counter the unique gendered harms women suffer, they have also addressed the vulnerabilities of women like battered women who offend by killing their partners. The two main partial defenses to murder in English criminal law are provocation

<sup>22</sup> Gruber, (2006–07) 92 *Iowa LR* 783 ff.

<sup>23</sup> Gruber, (2006–07) 92 *Iowa LR* 807, 809 ff.

(now loss of self-control) and diminished responsibility. Provocation had its roots in male “restoration gallantry” and demanded a sudden loss of control and an almost immediate response to provocation. In the early 1990s, several cases involving battered women came up against this narrowly drawn test of provocation. The simmering frustrations and helplessness of battered wives and their lingering response meant that their vulnerable mental condition from years of abuse could, at best, be considered for the defense of diminished responsibility although Battered Woman Syndrome (BWS) was not yet a recognized medical condition. Through the persistent activism of feminists, however, courts were compelled to recognize the gender bias inherent in these partial defenses to murder. Feminists have followed court cases implicating the defense of provocation even where it involved a male defendant who killed a male friend. In the case of *Morgan Smith*,<sup>24</sup> for instance, the crucial issue was whether the characteristics of the defendant could be taken into account when determining whether the defendant’s response to the provocation was reasonable. Although *Morgan Smith* held such characteristics to be relevant, a subsequent Privy Council decision in the case of *Holley*<sup>25</sup> adopted a more objective standard leading to feminist criticism.

Ever since the early 1990s and feminists’ elaboration of the “gendered morphology and ontology of provocation” (a term coined by Edwards), as well as the indifference of English law to the social realities of women’s lives, the reform of the partial defenses has had to seriously consider implications for battered women who kill. The Coroners and Justice Act 2009 is the latest such attempt and although it has rendered the response leg of the loss of self-control defense more objective, it responds to sustained feminist critique over the years. Thus, the loss of control need not be sudden as long as the response is not an act of revenge. The qualifying triggers now include an anger trigger and a fear trigger; the latter geared toward battered women. Some have criticized the micro-management of the defense of loss of self-control into which they think battered women have been shoehorned. Sexual infidelity meanwhile is explicitly excluded as a qualifying trigger demonstrating Parliament’s zero-tolerance approach toward the violent behavior of jealous men. Some allude to this move as signifying gesture politics but, while it is too soon to predict the practical effects of the 2009 law, the sexual infidelity exclusion has already been compromised in the case of *Clinton*.<sup>26</sup> Even as the defense of loss of self-control was being refashioned, BWS became a recognized medical condition so that the defense of diminished responsibility can now be utilized by battered women.

<sup>24</sup> *R. v. Smith (Morgan)* [2000] 3 WLR 654.

<sup>25</sup> *Attorney-General for Jersey v. Holley* [2005] UKPC 23.

<sup>26</sup> *R. v. Clinton* [2012] EWCA Crim. 2.

Battered women's use of the two partial defenses to murder has not been straightforward. Even as social science literature pointed to the "learned helplessness" that domestic violence fosters, using BWS, some activists felt, reiterated a disempowered image of battered women as mentally compromised victims. Indeed, as Suk demonstrates, the subordinated status of the battered woman has influenced United States criminal law doctrine. The defense further individualized battered women's cases rather than focusing on collective redistributive strategies. Moreover, using BWS is hardly compatible with the use of self-defense, which assumes women's agency in the face of danger. Also, self-defense can result in a complete acquittal whereas a successful partial defense only reduces the sentence to one for manslaughter. Hence, some feminists have called for rethinking self-defense devoid of its own gender biases. This has not happened.

#### 4. The transnational diffusion of feminist ideas in criminal law

A striking aspect of the feminist project in criminal law is the astonishing similarity in conceptual and institutional content across domestic jurisdictions. This diffusion is made possible through human rights law and practice. The violence against women movement in particular has made possible the international export and transplantation of norms and institutional machineries. This is not to suggest a seamless translation of norms and bureaucracies into domestic jurisdictions. As Sally Merry has shown, intermediaries and elites who inhabit spaces of transnational modernity at the international venues where international human rights documents are negotiated then perform considerable intellectual labors to appropriate these ideas domestically and frame them in order to achieve local resonance. Transmission is enabled through elite norm entrepreneurs and social service providers who transplant programs conceptualized elsewhere as with domestic violence. This international reach of human rights law has been further enhanced by the globalization of legal education and the legal profession. Every year, thousands of law school students and academics from elite Anglo-American law schools travel to other parts of the world to assist with law reform while local elites transact with them in the language of transnational modernity. Thus, the Verma Committee appointed days after the infamous Delhi rape and murder profusely thanked several U.S.- and U.K.-based feminists in its report. By then, a Harvard task force was set up to advise South Asian governments on violence against women, much to the alarm of Indian feminists. Innovative ideas like command responsibility, developed in the crucible of international and transnational criminal law, were sought to be incorporated into domestic rape law as demanded by Indian feminists.

### III. FEMINIST INTERVENTIONS IN INTERNATIONAL CRIMINAL LAW

In the 1970s and 1980s, feminists working in international human rights sought to bring gender concerns to the center of human rights discourse. The armed conflicts in Yugoslavia and Rwanda in the early 1990s meanwhile resulted in large-scale genocide, which then spurred the development of international criminal law through the creation of the ad hoc tribunals of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to deal with genocide, war crimes, and crimes against humanity. Feminists were present in the development of international criminal law right from the very start as reports of the sexual violence that accompanied such armed conflicts came to light. Up until then, as Alison Cole has argued, not only were crimes of rape and sexual violence slipping through the cracks of international law, but there was also widespread denial as to their very existence. However, under both the ICTY and ICTR Statutes, rape was considered to be a crime against humanity. Rapes were prosecuted as torture and war crimes and addressed in the context of enslavement. In the path-breaking case of *Akayesu*,<sup>27</sup> the ICTR held that genocide could be committed through acts of rape and sexual violence. Although the *Akayesu* decision was not consistently followed in subsequent cases, its definition of rape touched on conceptual issues that were core to domestic feminist debates on rape.

The *Akayesu* decision defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” As I have already alluded to, much feminist effort has gone into expanding the definition of rape in domestic legal jurisdictions from requiring penile penetration by a man of a woman to cover instances of non-penile penetration perpetrated against both men and women. The reluctance of *Akayesu* to spell out the exact physical acts constituting rape was welcomed as it emphasized the violation of bodily autonomy (the effect) rather than the precise nature of the act, which reflected hetero-patriarchal assumptions of honor and shame. Also, significantly, feminists had been lobbying domestically for a consent standard in rape to obviate the need to prove physical force and resistance for a successful rape conviction. Yet *Akayesu* embodied the very gist, it seemed, of a feminist theory of rape as sexual subordination in that it presumed the lack of consent in coercive circumstances such as armed conflict or military presence of threatening forces on an ethnic basis. In other words, the decision recognized the inevitability of lack of consent in conditions of armed conflict such that a successful conviction for rape ought not to start with the requirement to prove lack of consent but to presume it.

<sup>27</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sept. 2, 1998.

Yet, as always, feminists were divided over how international criminal law must define rape. These differences can be traced back to how different schools of feminism understand rape. The *Akayesu* definition was compatible with a radical feminist understanding of rape: this is because the early radical feminist conceptualization of rape viewed patriarchal force and coercion as endemic so as to render consent a meaningless concept. As MacKinnon famously observed:

force and desire are not mutually exclusive under male supremacy. So long as dominance is eroticized, they never will be. Some women eroticize dominance and submission; it beats feeling forced. Sexual intercourse may be unwanted, the woman would never have initiated it, yet no force may be present . . . If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful consent.<sup>28</sup>

Although some scholars adopt this formulation of rape, it has failed to gain traction in domestic law. In the international context of armed conflict, however, this understanding of rape is appealing, finding support amongst those who perceive a difference between everyday rape and wartime rape. Hence, while a consent standard is appropriate for domestic rape, a coercion-based standard as articulated in *Akayesu* is ideal for addressing the challenges of sexual violence in wartime. Yet, there is a feminist camp persuaded by MacKinnonite thinking, MacKinnon included, which opines that there is no difference between everyday rape and wartime rape. Hence, the *Akayesu* reading of rape can be imported back into domestic law and some U.S. states such as California and Illinois have indeed done so. This impulse to push forward the radical feminist conceptual apparatus, however, sits in deep tension with the strategic imperatives of feminist activism. Thus, in the process of heightening the significance of sexual violence in wartime, MacKinnon has argued for rape to be prosecuted as genocide under international criminal law.<sup>29</sup> In arguing for the recognition of genocidal rape, however, MacKinnon has had to distinguish it from just rape in war or everyday rape; she theorizes it as being coterminous with everyday discrimination such that sex inequality itself becomes genocide and we are left wanting to punish gynocide! Also, in calling for the prosecution of genocidal rape, she ends up privileging ethnic differences and therefore rape by wartime victors rather than rape on all sides of an armed conflict.

An opposing feminist view wanted to acknowledge rape on all sides of a war as equally serious. Some feminists were also uncomfortable with the unintended consequences of a broad *Akayesu*-type reading of rape. For one, the elimination of a defense of consent could undermine the defendant's right to fair trial. Feminists like Karen Engle, Annelise Lottmann, and Janet Halley also disagreed with the position that treats rape as "a fate worse than death" as not only misinterpreting certain

<sup>28</sup> Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence," (1983) 8 *Signs* 650 ff.

<sup>29</sup> Catherine MacKinnon, "Rape, Genocide, and Women's Human Rights," (1994) 17 *Harvard Women's Law Journal* 5.



cultural attitudes toward sex and honor but also intensifying for women the shame and loss of honor that rape implies, thus valorizing the value of rape as a weapon of war. For these feminists, the mainstream view also suggests a hierarchy of harms wherein sexual violence is worse than other forms of violence, including even the killings of these women's male relatives. Indeed, a heightened view of rape as the worst violation meant that women who "chose" to be raped under force of circumstance by an enemy offering them a means of sustenance over death from starvation risked being labeled traitors.<sup>30</sup> Demonstrating the seriousness of wartime rape also brings with it a severely compromised view of female sexual agency in relation to the enemy. A strictly gendered view of sexual violence additionally renders invisible women's role in perpetrating sexual violence. Further, focusing on genocidal rape reinforces essentialist notions of ethnic difference, which can stand at complete odds with the social history of a conflict-ridden region where inter-ethnic sexual alliances were widespread. This supports nationalist narratives of conflict. As Engle argues, such a reading is also sexist—assuming that children of raped Bosnian Muslim women are automatically Serbs places a premium on Serbian sperm instead of their being born of a Bosnian Muslim woman's womb.

The momentum that feminists experienced in lobbying the ICTY and ICTR found fruition in the negotiations leading to the 1998 Rome Statute, which came into force in 2002 and established the International Criminal Court (ICC). Some feminists have welcomed the fact that the Rome Statute went further than the ad hoc tribunals by referring not only to rape but also to sexual slavery, enforced prostitution, female trafficking, forced pregnancy, and enforced sterilization as war crimes and crimes against humanity under the ICC and for finding that persecution for purposes of crimes against humanity can be committed on the basis of gender discrimination. The Rome Statute has a raft of procedural protections for victims of sexual violence in armed conflict. Yet Halley has been critical of feminist efforts to move sexual crimes up the hierarchy of crimes under international humanitarian and criminal law, to particularize and indeed exceptionalize them in feminist terms, to concentrate specific prosecutions exclusively on charges involving sexual violence and maximizing the evidentiary requirements for proof of rape by eliminating or modifying the defense of consent.<sup>31</sup> Halley demonstrates how these moves were only intensified leading up to the Rome Statute negotiations. Feminists formed a consensus around an updated radical feminism, which she calls feminist universalism and which channeled a law reform project specifically to include rape in the Rome Statute, as well as sexual slavery, forced pregnancy and sterilization, and sexual violence. Enslavement was expanded to include trafficking in persons, and honor and dignity were de-linked from these crimes. However, forced

<sup>30</sup> Halley, (2008) 9 *Melbourne Journal of International Law* 105 ff.

<sup>31</sup> Janet Halley, "Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict," (2008) 9 *Melbourne Journal of International Law* 83 ff.



maternity, forced abortion, forced marriage, forced nudity, sexual molestation, and sexual humiliation did not make it into the Rome Statute. Although feminist efforts evolved from a focus on rape to sexual violence to sexual slavery and culminated in the demand for crimes against gender violence (covering men in the position of the social woman), the crime of gender violence was not included in the Statute.<sup>32</sup> Nor did feminist attempts to deploy international humanitarian and criminal law to hold states accountable for everyday rape during peacetime succeed. Thus, the feminist project in international criminal law has been predominantly in a winning position despite losses relating to feminists' most expansive classificatory ambitions. Feminists have managed to shape the course of international criminal law in its early stages of development and can be relatively more assured of their influence internationally given that it encapsulates the core of international law values and is already binding on nation-states.

#### IV. FEMINIST INTERVENTIONS IN TRANSNATIONAL CRIMINAL LAW

Scholars of international criminal law often distinguish between international law in the strict sense, encompassing core crimes and transnational criminal law, which deals with crimes of international concern or treaty crimes. Whereas international criminal law consists of crimes, firmly established in customary international law and providing for individual penal responsibility for violations of international law before an international penal tribunal, transnational criminal law deals with the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential transboundary effects. States in the latter instance sign on to suppression conventions that obligate states to enact and enforce municipal offenses. In an article in 2003, Neil Boister called for theorizing the separate field of transnational criminal law as distinct from international criminal law because, although it is in his view "the most significant existing mechanism for the globalization of substantive criminal norms,"<sup>33</sup> it has not been subject to the level of theoretical scrutiny as have domestic criminal laws. Boister argues that transnational criminal law exhibits a democratic deficit in its formulation, lacks doctrinal coherence and a general grammar of criminal and penal policy amongst

<sup>32</sup> Janet Halley, "Rape at Rome: Feminist Inventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law," (2009) 30 *Melbourne Journal of International Law* 7 ff.

<sup>33</sup> Boister, (2003) 14 *European Journal of International Law* 956 ff.

different countries, has little human rights protection, and has weak enforcement measures. Even as Boister was naming the field of transnational criminal law into being, feminists had already successfully participated in the negotiation of a major piece of transnational criminal law; namely, the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking Against Persons, Especially Women and Children (the UN Protocol)<sup>34</sup> supplementing the 2000 United Nations Convention Against Transnational Organized Crime.<sup>35</sup> Feminist efforts on the transnational issue of trafficking were not new, however; they had earlier engaged with a similar suppression treaty; namely, the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the 1921 International Convention for the Suppression of the Traffic in Women and Children adopted by the League of Nations. None of these treaties have, however, enjoyed the popularity of the UN Protocol. The 1949 Convention, for instance, had 25 signatories whereas the UN Protocol has had more than 150 signatories in the first ten years of its adoption.

This section investigates the context in which feminists enjoyed phenomenal success in negotiating the UN Protocol and asks if the enforcement of the UN Protocol has furthered the rights of women and other vulnerable populations. American legal scholar Janie Chuang has detailed how differences amongst American feminists on how to conceptualize prostitution and sex work resulted in the ideological capture of the negotiating positions occupied by both states and non-governmental organizations (NGOs) over the UN Protocol. These debates are animated, in particular, by the two oppositional camps of abolitionists or radical feminists, on the one hand, and sex work advocates, on the other. For abolitionist feminists, prostitution is the most extreme and crystallized form of all sexual exploitation, in turn the foundation of women's subordination and discrimination. For sex work advocates, sex work is a plausible livelihood option for women who, despite enormous structural constraints, exercise some agency. Trafficking is defined in Art. 3 of the UN Protocol and can be disaggregated in terms of the *mode* of recruitment (recruitment, transportation, transfer, etc.), the *means* by which it is obtained (threat or use of force or other forms of coercion, etc.), and the *purpose* for which it is obtained; namely, exploitation. In the case of people aged 18 and over, all three elements must be proved for a trafficking conviction.

The concept of *consent* was central to the UN Protocol negotiations, and was extraordinarily influenced by domestic Anglo-American feminist debates on sex work. The radical feminist, abolitionist camp wanted prostitution listed as an end purpose for which recruitment or transportation would automatically amount to

<sup>34</sup> G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49, Vol. I (2001).

<sup>35</sup> Transnational Organized Crime, G.A. Res. 53/111, U.N. GAOR, 53rd Sess., 85th plen. Mtg., U.N. Doc. A/RES/53/111 (1998).

trafficking even if it was with the woman's consent. In other words, they demanded that the purpose for which the means are used should result in a finding of trafficking, irrespective of the woman's consent. The liberal lobby meanwhile wanted to retain the possibility of migrant voluntary sex work by decoupling the means of recruitment from the end purpose. The resultant compromise achieved this decoupling with the caveat that where certain listed means—which were broadly phrased—were employed, trafficking had occurred as consent was irrelevant. In other words, where the levels of *coercion* as identified by the Protocol were used, consent was deemed absent. When it came to negotiations of the purpose element, namely, *exploitation*, prostitution was once again ambiguously listed as “exploitation of the prostitution of others.” Yet the preparatory notes to the Protocol clarified that this inclusion did not compromise states' domestic legal treatment of prostitution.

In the aftermath of the UN Protocol's adoption, both feminist camps claimed victory for their influence over the definition of trafficking. Within five years of the adoption of the UN Protocol, however, non-governmental actors such as the Bangkok-based Global Alliance Against Traffic in Women (GAATW) conducted a multi-country survey to conclude that the “anti-trafficking framework has done little good for the trafficked person and great harm to migrants and women in the sex industry.”<sup>36</sup> In a nutshell, despite the expansive Protocol definition of both the means and purpose of trafficking, in reality enforcement measures have been drastically confined to rescuing *women* who have been forced into *sex work* by *fraud*, *coercion*, or *deceit*. Specifically, despite the efforts of non-abolitionist NGOs at the UN Protocol negotiations to decouple trafficking from sex work and prostitution, and thus shake off the legacy of the 1949 UN Convention, they were unsuccessful. Not only was trafficking comprehended by states in terms of trafficking for sex work but it was also conflated with sex work itself. The sex sector has remained the primary focus of most countries' anti-trafficking efforts. 16% of the 155 countries surveyed by the United Nations Office on Drugs and Crime (UNODC) in 2009 had passed anti-trafficking laws that were limited to sexual exploitation or covered only women and children. In the United States itself, it was not until 2009 that the State Department emphasized forced labor in its annual trafficking report. Without doubt, this emphasis on trafficking into sex work has not meant better human rights protection for sex workers; if anything, assistance is typically conditional on assisting prosecutorial efforts. Some countries in fact revised their prostitution laws to decriminalize only “victim” sex workers, not “voluntary” sex workers. Many of these anti-sex work initiatives worldwide received support from the erstwhile Bush Administration and its coalition with conservative Christian groups as well as through the extra-territorial operation of a U.S. domestic law, namely, the Victims of Trafficking

<sup>36</sup> GAATW, *Collateral Damage The Impact of Anti-Trafficking Measures on Human Rights Around the World* (2007), 17 ff.

and Violence Protection Act, 2000 and its practice of classifying states in terms of their anti-trafficking initiatives through the annual Trafficking in Persons Reports.

The exceptionalist treatment of sex work in early anti-trafficking law meant that trafficking into labor sectors other than sex work, often referred to as “labor trafficking” received less attention than it was due. Anti-trafficking law was also effectively used against refugees, asylum seekers, and migrants, especially undocumented ones. Experts claim that the very passage of the UN Convention against Transnational Organized Crime was motivated by sovereignty and security concerns rather than the human rights of migrant and trafficked groups. With border control at the heart of the UN Protocol, both countries of origin and transit were effectively conscripted as low-cost agents of first world states of destination to control migration resulting in significant damage to human rights. The heavily gendered discourse of trafficking also disincentivized female migrants from traveling for work. As countries sign, ratify, and conform their domestic laws to the UN Protocol, the implementation of anti-trafficking law has tended to be both over-inclusive in targeting women engaged in voluntary sex work and under-inclusive in not addressing trafficking into non-sex work sectors.

Two trends characterize the current phase of anti-trafficking law. First, states are increasingly inclined not to conflate trafficking with trafficking for sex work or sex work itself, adopting instead at least at a doctrinal level domestically, a broader Art. 3 definition of trafficking. This does not imply an equal allocation of resources to prosecute trafficking for sex work and into other labor sectors; it does, however, mean that as states continue to legislate domestic anti-trafficking law and make related institutional arrangements, intra-feminist contestations that plagued the UN Protocol negotiations will be re-staged at a domestic level. The second trend revolves around attempts to resolve the continued conceptual ambiguity surrounding the core definitional terms of Art. 3. In the absence of clarity around concepts such as “abuse of position of vulnerability” and “exploitation,” the scope of the UN Protocol remains unclear. The UNODC has commissioned issue papers on these core concepts, admitting its lack of data on the magnitude of the problem of trafficking and states’ uneven compliance with Protocol obligations. Significantly, where the International Labour Organization (ILO) had previously stood on the borderline of the trafficking debates having assumed a controversial position in 1998 on the “sex sector,” the ILO is now conceptualizing trafficking as a form of forced labor thereby consolidating decades of efforts to eradicate forced labour. The ILO’s increased visibility on trafficking and its proposed standard setting to supplement the Forced Labour Convention of 1930 offers feminists a renewed opportunity to rethink the unintended consequences of the preoccupation of anti-trafficking law with sex work and the implications of using a more nuanced and less carceral form of anti-trafficking law to protect a larger constituency of both trafficked men and women.

## V. THE FEMINIST WILL TO POWER—GOVERNANCE FEMINISM IN CRIMINAL LAW

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### 1. Governance feminism elaborated

Even the brief survey so far demonstrates the considerable success of feminist projects in domestic, international, and transnational criminal law. Whether at the domestic or international levels, feminists have gone from being marginal social movement actors, literally “outsiders” who had an oppositional consciousness toward state power to becoming forceful advocates for increased domestic criminal law who then also occupied a central and often vanguard role in the development of emerging fields of criminal law at the international level. Indeed, it is this feminist influence in the varied arenas of criminal law that drew some of us to chronicle feminists’ achievements as governance feminism (GF). Halley defines GF as follows:

GF is, I think, an underrecognized but important fact of governance more generally in the early twenty-first century. I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want—far from it—but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.<sup>37</sup>

GF successes in criminal law typically deploy a radical feminist view of violence against women overshadowing competing feminist narratives. If we were to think of radical feminism in terms of Catharine MacKinnon’s early writings, the state was viewed as patriarchal and incapable of addressing sexual subordination, the root cause of women’s inequality. How such a sophisticated feminist theory has today morphed into a decidedly liberal project calling for criminal law intervention by a neoliberal penal state, often supported by religious conservative groups, is befuddling to say the least. Numerous factors seem to be at play in this familiar “input/output” problem for feminists. In terms of the “input,” whether on rape, domestic violence, trafficking, stalking, or voyeurism, the radical feminist impulse to theorize sexual coercion as pervasive in light of its theory of sexual subordination leads feminists to reach for the sharpest legal instrument available, namely, criminal law, necessitating the intervention of the state. Bernstein characterizes this

<sup>37</sup> Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism,” (2006) 29 *Harvard Journal of Law & Gender* 335 ff., 340.

vocal feminist insistence on criminalization as carceral feminism.<sup>38</sup> The ascendancy of carceral feminism also concerns dynamics within the women's movement. Especially on issues of considerable feminist divergence like sex work and trafficking where a radical feminist point of view faces an equally structuralist but sex positive position, consensus-building results in a middle-ground liberal feminist view.<sup>39</sup> Consensus is achieved at the cost of discursive complexity. Interestingly, a middle-ground position is not incompatible with increased criminalization because the very platform for consensus is the need to tackle the worst forms of coercion, violence, and exploitation.

Once the state is implicated, the "output" is mediated by numerous factors, including the emergence of an international violence against women movement, shifts in the agenda of the American Christian Right, the rightward drift of certain feminist camps, and the crisis of the modern welfare state coupled with the emergence of a neoliberal sexual agenda. States have surprisingly been eager to embrace carceral projects much to the surprise of feminists. As Doezeema notes, of all the issues raised over the past two decades by feminists, trafficking in women is the one on which even governments hostile to feminist arguments have been willing to "jump into bed" with feminists.<sup>40</sup> States could not, however, be bothered with the niceties of feminist theorizing and are often content with the most simplistic notion of gender inequality, resulting in paternalist and protectionist policies, all while paying lip service to women's rights and securing legitimacy. The next section deals with the repetitive quality of enforcement patterns once these hard-won victories have been achieved.

## 2. Repeat patterns in criminal law reform

With the law of rape, despite a structural understanding of coercion and the shift to a consent standard, reforms have played out to produce a thin notion of consent. As Nourse notes, resistance has resurfaced to resolve the normative ambivalence of force and consent so that if the victim physically resists, courts and juries feel certain that she did not consent since physical force was used to accomplish sex. A deeper understanding of coercion itself is lost. Munro confirms this pattern in the British context. The centrality of overt coercion is reasserted in distinguishing acceptable from unacceptable forms of sexual aggression, thereby identifying, "deserving" victims who have experienced "real" harm. Further, as Gruber has pointed out, some

<sup>38</sup> Elizabeth Bernstein, "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-Trafficking Campaigns," (2010) 36 *Signs* 45–71 ff.

<sup>39</sup> See Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (2011) for a discussion, particularly ch. 2.

<sup>40</sup> Jo Doezeema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (2010), 172 ff.

feminists' own adoption of a prosecutorial attitude, which largely conceives of rape (and crime in general) as a product of individual criminality rather than social inequality, means that the criminal law decontextualizes rape from the wider issue of gender inequality. As state institutions adopt the most simplistic version of the feminist critique, the liberal view of violence against women prevails over a radical feminist view of coercion as pervasive. The malleability of legal concepts like coercion, consent, and exploitation can also be seen in relation to sex work and trafficking. Narrow interpretations of coercion in the context of trafficking support the state's border control project, thus introducing a high threshold for trafficked status. Similarly, a broad understanding of exploitation renders any form of sex work for purposes of the trafficking offense as exploitative per se. Interpretations of these different concepts can produce over-inclusive and over-protectionist outcomes in individual cases where complex dynamics, both structural and interpersonal, are at play.<sup>41</sup>

Feminists' emphasis on coercion and their use of the trope of victimhood for achieving law reform have often produced another significant casualty, namely, women's agency. Both rape and domestic violence reforms essentialize women so that victims are portrayed as "paralyzed by fear, weak-willed, and even automaton-like."<sup>42</sup> Such feminist portrayals of women are amply evident in the sex work and trafficking debates. Radical feminists' focus on eradicating questionable (if not all) sex as if it were a virus, argues Gruber, denies women sources of pleasure while the overcriminalization of sexual "coercion" has led to repressive chastity norms and morality policing.<sup>43</sup> Ironically, then, in her view feminist reformers have utilized the very mechanism of female objectification (presumably also a target of reform) in its effort to advocate for domestic violence criminalization rather than offering a more complicated account of the constrained agency of women. Conceptual difficulties and interpretive possibilities are in turn compounded by institutional biases producing a yawning gap between hard-won feminist doctrinal victories and their impact on the ground. At several points in the criminal justice system, these reforms are watered down through the actions of enforcement personnel such as the police and prosecutors or even the dispositions of jurors.

The criminal law can also generate remarkably perverse results. Literally every feminist success in criminal law is able and does inflict further harm on the very women that the law was created to benefit, often on the basis of patriarchal norms of sexual morality. Rape law is littered with judgments as to the victims' character. Gruber notes how prevailing gender norms restrict rape reform's

<sup>41</sup> Vanessa Munro, "An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales," (2010) 63 *Current Legal Problems* 58 ff.

<sup>42</sup> Aya Gruber, "A 'Neo-Feminist' Assessment of Rape and Domestic Violence Law Reform," (2012) 15 *Journal of Gender, Race & Justice* 601 ff.

<sup>43</sup> Gruber, (2009) 84 *Washington LR* 612.



expressive value so that rape shield laws are justified on the basis of protecting the right to privacy rather than rendering past sexual history irrelevant to consent. In domestic violence, battered women can be prosecuted for failing to support the state's prosecution efforts against her male partner. An anti-sex work law that seeks to exonerate sex workers from prosecution might well be limited only to innocent sex workers tricked into sex work rather than women selling sex under severe force of circumstance. This has led feminists to ruminate over the law's deception. For Munro, despite the progressive feel of policy rhetoric, the law when implemented reinserts hierarchies of victimhood, distracts from crucial questions about agency, constraint, and construction, and serves to insulate the law from internal critique. Surveying reforms in the areas of rape, domestic violence, and the law of self-defense, Nourse notes how reform perpetuates the notion of progress while reiterating old norms, which are in turn "resurrected in empty spaces, deliberate ambiguities, and new rhetorics."<sup>44</sup> She states that this is to be expected when law reform is won at the cost of deliberative ambiguity, which eventually generates high costs. Ambiguity hides discarded or unlikely norms, making it difficult to know precisely what the norm is, which produces the illusion of reform thus forestalling further reforms whereas the insidious effects of the old norms persist. This generates hypocrisy at the very least, if not perversity.

### 3. A feminist legal realist view of criminal law

The case for feminists to rethink the use of the criminal law is compelling. Politically, we might revive self-help strategies characteristic of second-wave feminist movements. Legally, rape law reformers might turn to, say, tort law. Feminists, however, are too deeply implicated in criminal law reform to entertain these possibilities seriously. Indeed, whether at the domestic or international level, feminists have often started out lobbying for a specific offense like rape but then escalated their demand for criminalizing all-encompassing behavior such as sexual violence and gender violence. One way to minimize feminist disappointment (which otherwise translates into demands for more criminal law) would be to entertain a nuanced legal realist understanding of the criminal law, one which is not preoccupied with an enforcement gap between law in the books and law in action. Duncan Kennedy's idea of the tolerated residuum is illuminating here. Writing in the context of rape laws, Kennedy has proposed that the legal system will *always* tolerate a certain level of sexual abuse, which he terms as the tolerated residuum of abuse. This residuum depends on contestable social decisions about what abuse is and how important it is to prevent it. This in turn affects practices of abuse and social practices of both

<sup>44</sup> Nourse (n. 3) 952 ff. quoting Siegel.



men and women, irrespective of whether they themselves are abusers or victims.<sup>45</sup> This realist view of the criminal law not only expands feminists' vision as to the distributive consequences of rule changes on a range of stakeholders but also tempers demands for increased state intervention, whose potential for producing perverse results is well known.

The need to rethink criminal law is particularly striking when we consider its counterintuitive effects on markets such as sex work. States can legislate diametrically opposing policy reforms on sex work ranging from increased criminalization (the United States and Sweden) to legalization (the Netherlands) but end up with similar effects on sex industries. This may be because in these domestic contexts, the unstated enforcement prerogative is different from the official law on the books or because there are huge institutional inefficiencies in translating policy into action. Such similarities in outcomes have caused some non-lawyer feminists to consider the law as irrelevant, while others have attributed these outcomes to regulatory dynamics in post-industrial economies and to the interaction between the criminal law and modes of governmentality. I have meanwhile shown that where the market is the target of criminal law intervention, a more nuanced account of the interaction between the criminal law, civil law, market practices, and informal social norms is indispensable. In the anti-trafficking debates for instance, a key question remains whether labor law is not more suitable than the criminal law.

## VI. CONCLUSION—COMING BACK FULL CIRCLE OR THE WAY FORWARD?

Back in 1989, launching the feminist legal project in law, Carol Smart expressed skepticism about the criminal law given its “juridogenic” nature. She warned against being seduced by it, and in particular against MacKinnon’s totalizing theory of gender subordination that led her to criminal law reform. Not long after that, Lacey critiqued MacKinnon and Dworkin’s view on pornography for “representing feminism as a political doctrine which is conservative, authoritarian and unconcerned with free expression”<sup>46</sup> while being too optimistic about state politics; a strategically uncertain path. Lacey’s predicament remains with us:

<sup>45</sup> Duncan Kennedy, *Sexy Dressing etc.: Essays on the Power and Politics of Cultural Identity* (1993), 137 ff.

<sup>46</sup> Lacey (n. 2) 94–95 ff.

It is a serious and recurrent question whether any specific post-liberal vision can remain intact once one has entered into liberal legal reform. The subsequent processes of interpretation and enforcement involve the imposition of liberal categories and arguments which inevitably distort analysis of the situation or phenomenon which is to be ameliorated.<sup>47</sup>

More than 25 years after Smart's initial provocation, we have come full circle. Whereas in the 1980s feminists struggled to get states to understand the core message of feminism, today it has become common sense even for states. Rather than the criminal justice system adopting a feminist agenda, as Gruber claims, feminist reformers have adopted the criminal justice system's agenda! In this chapter, I have charted feminist contributions to the building out of an expanding architecture of criminal law at the domestic, international, and transnational legal levels, which has traveled far and wide through the human rights machinery. Feminist "success" has however come at a steep cost, including for women's rights. If, as Nourse claims, reform is typically a "marbled" affair and the rich veins of new law cut across the "plain vanilla" of settled, conventional belief, it is little surprise that the promises of criminal law remain illusory for feminists. Feminism's own image might be a casualty where, as Gruber reminds us, opposition to the criminal law remains the hallmark of progressive movements.

Looking forward, how should feminists relate to the criminal law? Gruber proposes outright disengagement as the lonely voice of women's empowerment will not be heard above the sound and fury of the U.S. criminal system's othering discourse. A return to the streets is the only way out. Alternatively, she looks to policy efforts that transform economic distributions and cultural attitudes. After all, the opportunity costs of pursuing criminal law reforms are substantial in that they ignore the distributive functions of both public and private law, which undergird the system of sexual subordination. Another alternative might be to continue mapping the disparate effects of the criminal law in relation to the institutions of the market and family and for varied constituencies therein. This may mean introspecting over-cherished feminist beliefs as recent research on rape myths in the United Kingdom suggests. Feminists cannot also be oblivious to unexpected political opportunities: although deeply tragic, the brutal Delhi gang rape and murder of a young woman mobilized millions of Indian men and women alike in a way that the Indian women's movement has failed to do. Although a critical analysis of the resultant rape law reforms is sobering given the increased role for the Indian state, the incident seems to have shifted, even if minimally, the state's tolerated residuum of abuse. Feminists in such circumstances have no choice but to engage with the state and may have to do so in a constrained manner. The challenge is to use the expanded policy opportunities around "violence against women" while resisting the individualizing, retributive thrust of governmental agendas.<sup>48</sup>

<sup>47</sup> Lacey (n. 2) 94 ff.

<sup>48</sup> Lise Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neoliberal Sexual Citizenship," in Dorothy E. Chunn, Susan B. Boyd, and Hester Lessard (eds.), *Feminism, Law and Social Change: (Re)action and Resistance* (2007), 130 ff.

In conclusion, feminists today are at a unique juncture. The cautions of an earlier generation of feminists against embracing state power have been thrown to the wind as feminists have increasingly gained a foothold in the governance of sex and gender through the criminal law. Feminists' attachment to the gendered construction of harm and a commitment to representing females notwithstanding, our critical impulses entail wielding power sensibly, including speaking out for the interests of men when needed. The recent Indian rape law reforms, for instance, criminalize trafficking but not forced labor, a condition under which many Indian men struggle. Feminists may even consider abandoning the "intellectual ghetto" of gender- and sex-based crimes to, say, critiquing core preoccupations of criminal law theory or its relation to the political economy of crime. Untethering feminist scholarship from an exclusive preoccupation with women, gender, sex, and harm could well further the feminist critique of criminal law rather than the feminist project in criminal law.

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